JUDGES' BENCHBOOK
OF THE
BLACK LUNG BENEFITS ACT

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SUPPLEMENT TO JUDGES' BENCHBOOK: BLACK LUNG BENEFITS ACT

[to be placed behind the *Supplement* tab]
[discard prior supplement]

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Editor in Chief

III. Chest roentgenogram evidence

A. Physicians' qualifications

1. Dually-qualified physicians

In *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 842-43 (7th Cir. 1997), the court upheld the ALJ's decision to accord greater weight to the interpretation of a dually-qualified physician over the interpretation of a B-reader, who was not certified in radiology.

VI. Medical reports

B. Undocumented and unreasoned opinion of little or no probative value

Failure to adequately address causation. In *Cannelton Industries, Inc. v. Director, OWCP [Frye]*, Case No. 03-1232 (4th Cir. Apr. 5, 2004) (unpub.), the court concluded that the ALJ properly accorded less weight to the opinion of Dr. Forehand, who found that the miner was totally disabled due to smoking-induced bronchitis but failed to explain "how he eliminated (the miner's) nearly thirty years of exposure to coal mine dust as a possible cause" of the bronchitis. In affirming the ALJ, the court noted that "Dr. Forehand erred by assuming that the negative x-rays (underlying his opinion) necessarily ruled out that (the miner's) bronchitis was caused by coal mine dust . .

Reversibility on pulmonary function testing; residual disability. In *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the court upheld the ALJ's finding that reversibility of pulmonary function values after use of a bronchodilator does not rule out the presence of disabling coal workers' pneumoconiosis. In particular, the court noted the following:

> All the experts agree that pneumoconiosis is a fixed condition and therefore any lung impairment caused by coal dust would not be susceptible to bronchodilator therapy. In this case, although Swiger's condition improved when given a bronchodilator, the fact that he experienced a disabling residual impairment suggested that a combination of factors was causing his pulmonary condition. As a trier of fact, the ALJ 'must evaluate the evidence, weigh it, and draw his own conclusions.' (citation omitted). Therefore, the ALJ could rightfully conclude that the presence of the residual fully disabling impairment suggested that coal mine dust was a contributing cause of Swiger's condition. (citation omitted).

Slip op. at 8.

C. Physicians' qualifications

1. Treating physician

b. After applicability of 20 C.F.R. Part 718 (2001)

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004), the court held that the ALJ improperly accorded less weight to the treating physician's opinion that coal workers' pneumoconiosis was present. The court reasoned as follows:

> The ALJ stated that he did not credit Dr. Karlavage's opinion as that of a treating physician because Dr. Karlavage had only seen Soubik three times over six months. That was, of course, three more times and six months more than Dr. Spagnolo saw him. So easily minimizing a treating physician's opinion in favor of a physician who has never laid eyes on the patient is not only indefensible on this record, it suggests an inappropriate predisposition to deny benefits. It is well-established in this circuit that treating physicians' opinions are assumed to be more valuable than those of non-treating physicians. *Mancia v. Director, OWCP*, 130 F.3d 579, 590-91 (3d Cir. 1997). The ALJ nevertheless ignored Dr. Karlavage's clinical expertise; an expertise derived from many years of diagnosing and treating coal miners' pulmonary problems. The ALJ did so without making any effort to explain why Dr. Spagnolo's board certification in pulmonary medicine was a more compelling credential than Dr. Karlavage's many years of 'hands on' clinical training.

D. Equivocal or vague conclusions

º *Should "work in a dust-free environment"; not constitute finding of total disability. See White v. New White Coal Co.*, 22 B.L.R. 1-_, BRB No. 03-0367 BLA (Jan. 22, 2004).

E. Physician's report based on premises contrary to ALJ's findings

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004)1, the court held that a physician's failure to diagnose the presence of coal workers' pneumoconiosis would have an adverse effect on his or her ability to assess whether a miner's death was due to the disease. In *Soubik*, Dr. Spagnolo opined that, even if the miner suffered from pneumoconiosis, it would not have hastened his death. The court stated the following with regard to considering Dr. Spagnolo's opinion on the issue of causation:

> Common sense suggests that it is usually exceedingly difficult for a doctor to properly assess the contribution, if any, of pneumoconiosis to a miner's death if he/she does not

1 While the case was pending on appeal, the court noted that the widow died and the executor of her estate, John Soubik, was substituted as the appellant.

believe it was present. The ALJ did not explain why Dr. Spagnolo's opinion was entitled to such controlling weight despite Dr. Spagnolo's conclusion that Soubik did not have the disease that both parties agreed was present.

J. Extensive medical data versus limited data

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the court held that it was proper for the ALJ to accord greater weight to a physician who "integrated all of the objective evidence" more than contrary physicians of record, particularly where the physician considered test results showing diffusion impairment, reversibility studies, and blood gas readings."

L. Death certificates

In *Hill v. Peabody Coal Co.*, Case No. 03-3321 (6th Cir. Apr. 7, 2004) (unpub.), the Sixth Circuit held that a treating physician's notation on a death certificate that pneumoconiosis was a cause of the miner's death, without explanation, was insufficient to meet the standard at 20 C.F.R. § 718.205 (2001). The court reiterated its holding in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509 (6th Cir. 2003) that treating physicians' opinions "get the deference they deserve based on their general power to persuade." Citing to the Fourth Circuit's decision in *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192 (4th Cir. 2000), the Sixth Circuit determined that a physician's conclusory statement on a death certificate, without further elaboration, is insufficient to meet Claimant's burden as to the cause of death.

N. Medical literature and studies

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the ALJ properly discredited a physician's report that "referenced parts of the medical literature that deny that coal dust exposure can ever cause pneumoconiosis" and where the physician stressed the absence of chest x-ray evidence of the disease and erroneously relied on "the absence of pulmonary problems at the time of (the miner's) retirement from coal mining." The court held that this was contrary to the premise that pneumoconiosis may be latent and progressive.

Chapter 4
Limitations on Admission of Evidence

I. Limitations of documentary medical evidence

C. Hospitalization and treatment records unaffected

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-__, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (en banc), the Board held that treatment records, containing multiple pulmonary function and blood gas studies that exceed the limitations at § 725.414, are properly admitted. This is so regardless of whether the records are offered by a claimant or an employer.

D. "Good cause" standard for admitting evidence over limitations

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-__, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (en banc), the Board held that "good cause" was not established solely on grounds that "the excess evidence was relevant." The Board noted that Employer "did not explain why the admitted evidence of record was insufficient to distinguish IPS from coal workers' pneumoconiosis, or indicate how (additional medical evidence) would assist the physicians."

F. CT-scans not limited under 20 C.F.R. § 725.414 (2001) [new]

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-__, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (en banc), the Board held that the evidentiary limitations at § 725.414 do not contain any restrictions on "other medical evidence" submitted under 20 C.F.R. § 718.107 (2001). In particular, it noted that there are no limitations on the submission of CT-scans as part of a party's affirmative case. However, the Board stated that "[i]f a party submits other medical evidence pursuant to Section 718.107, Section 725.414 provides that the opposing party may submit one physician's assessment of each piece of such evidence in rebuttal." 20 C.F.R. § 725.414(a)(2)(ii) and (a)(3)(ii) (2001).

G. Evidence generated in conjunction with state claim [new]

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-__, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (en banc), the Board held that state claim medical evidence is properly excluded if it contains testing that exceeds the evidentiary limitations at § 725.414. In so holding, the Board noted that such records (1) "do not fall within the exception for hospitalization or treatment records," and (2) "they are not covered by the exception for prior federal black lung claim evidence" at 20 C.F.R. § 725.209(d)(1) (2001).

H. Substitution of medical evidence [new]

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-__, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (en banc), once Employer designated two medical reports in support of its affirmative case, the ALJ did not abuse his discretion in refusing to permit Employer to withdraw one of the reports at the hearing and substitute the report of another physician. In this vein, the ALJ "reasonably considered claimant's objection that he had relied on employer's prior designation of its two medical reports in developing his medical evidence." On the other hand, the Board concluded that the ALJ properly allowed Employer to substitute Dr. Wiot's reading of an October 2002 x-ray study for that of Dr. Bellotte. In a footnote, the Board stated that "Claimant (did) not argue that he uniquely relied on Dr. Bellotte's reading in developing his rebuttal of the October 2, 2002 x-ray."

I. Requiring identification of evidence more than 20 days prior to hearing [new]

In *Dempsey v. Sewell Coal Co.,* 23 B.L.R. 1-__, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (en banc), the Board concluded that it was proper for the ALJ to "rule on claimant's motions to exclude and order employer to identify which items of evidence it would rely on as its affirmative case pursuant to Section 725.414(a)(3)(i)" more than 20 days in advance of the hearing "because claimant explained that he was unable to proceed with development of admissible evidence under Section 725.414 until his motions to exclude excess evidence were decided." The Board noted that the ALJ left the record open for 45 days for Employer to respond and he "admitted two of the four items of post-hearing evidence that employer submitted in response to claimant's late evidence."

J. ALJ not required to retain proffered exhibits that are not admitted [new]

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-__, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (en banc), the Board held that an ALJ is not required to "retain the large number of excluded exhibits in the record." Citing to 20 C.F.R. §§ 725.456(b)(1) and 725.464 (2001) as well as 29 C.F.R. §§ 18.47 and 18.52(a), the Board concluded that the "procedural regulations do not impose a duty to associate with the record proffered exhibits that are not admitted as evidence."

K. Data underlying medical opinion must be admissible [new]

In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-__, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (en banc), the ALJ properly declined to consider one of two reports admitted as part of Employer's affirmative case. In particular, Dr. Bellotte issued a medical opinion based, in part, on his interpretation of a chest x-ray study. Because Employer opted not to utilize Dr. Bellotte's x-ray reading as one of the two permitted in its affirmative case, it was permissible not to consider Dr. Bellotte's medical opinion regarding the existence of pneumoconiosis. The ALJ found that the opinion was "inextricably tied to [Dr. Bellotte's] chest x-ray interpretation, which was

previously excluded from the record." The Board concluded that any chest x-ray referenced in a medical report must be admissible. The Board further noted that "[t]he same restriction applies to a physician's testimony."

The Board then noted that "[t]he regulations do not specify what is to be done with a medical report or testimony that references an inadmissible x-ray." However, it stated that "[r]eview of Dr. Bellotte's opinion reflects that his opinion regarding the absence of coal workers' pneumoconiosis was closely linked to his reading of the July 19, 2001 x-ray" such that the ALJ properly declined to consider it. In this vein, the Board held that the Seventh Circuit's holding in *Peabody Coal Co. v. Durbin*, 165 F.3d 1126 (7th Cir. 1999), requiring that an ALJ consider an expert medical opinion even if it was based on evidence outside the record, was inapplicable to claims arising under the amended regulations. In so holding, the Board noted that the *Durbin* court "emphasized the absence of any regulation imposing limits on expert testimony in black lung claims" in rendering its opinion at the time.

I. Limitation of documentary medical evidence

D. "Good cause" standard for admitting evidence over limitations

[The following case is reported for instructive purposes]

In *Howard v. Valley Camp Coal Co.*, Case No. 03-1706 (4th Cir. Apr. 14, 2004) (unpub.), the court upheld the ALJ's exclusion of certain exhibits offered by Claimant stating that she did not establish "good cause" for failing to exchange the exhibits with Employer at least 20 days prior to the scheduled hearing. In this vein, the court noted that Claimant's counsel argued before the ALJ that he was not aware that he had the exhibits and he was not aware that the exhibits "weren't already in the record." The court concluded that "[a]s a matter of law, this explanation, which was tantamount to an admission of inattentiveness, was insufficient to establish 'good cause' for failing to meet the deadline for exchange of documents not made part of the record before the district director."

Chapter 5
What is the applicable law?

VII. Address and phone numbers of circuit courts; jurisdiction

Name correction: Federal Circuit Court of Appeals
Jan Horbaly, Clerk of the Court

III. The existence of pneumoconiosis

A. "Pneumoconiosis" defined

2. After applicability of 20 C.F.R. Part 718 (2001)

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the court upheld application of the amended definition of "pneumoconiosis," *i.e.* that it is a latent and progressive disease. The court noted that the issue of "[w]hether pneumoconiosis . . . is a disease that can be latent and progressive is a scientific question," but the "Department of Labor's regulation reflects the agency's conclusion on that point" and the agency's regulation is entitled to deference. The court found that the regulation is designed to "prevent operators from claiming that pneumoconiosis is *never* latent and progressive." As a result, the court declined to require that Claimant present medical evidence that the miner's pneumoconiosis was "one of the particular kinds of pneumoconiosis that are likely to manifest latent and progressive forms."

3. Evidence relevant to finding pneumoconiosis

e. Pulmonary function studies not diagnose presence of pneumoconiosis

In *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the the ALJ discredited four out of five physicians rendering opinions in the case because they found no pneumoconiosis stating that the miner's "impairment was obstructive in nature." The court upheld the ALJ and noted that the definition of *legal* pneumoconiosis "may consist of an obstructive impairment." After reviewing comments of the physicians who stated, *inter alia*, that pneumoconiosis is associated with restrictive impairments and smoking is associated with obstructive impairments, the court concluded that such comments "supported the ALJ's findings that the employer's physicians were overwhelmingly focused on clinical rather than legal pneumoconiosis."

f. Stipulations

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004)2, the court held that the ALJ

2 While the case was pending on appeal, the court noted that the widow died and the executor of her estate, John Soubik, was substituted as the appellant.

erred in finding no pneumoconiosis based on the medical opinion of Dr. Spagnolo, where the parties agreed that the disease was present. Citing to *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002), the Third Circuit agreed that "an ALJ may not credit a medical opinion stating that a claimant did not suffer from pneumoconiosis causing respiratory disability after the ALJ had already accepted the presence of pneumoconiosis unless the ALJ stated 'specific and persuasive reasons' why he or she relied upon such an opinion." In this case, the ALJ did not offer "specific and persuasive reasons" for crediting Dr. Spagnolo's opinion.

g. Admission against interest [new]

In *Johnson v. Royal Coal Co.*, 22 B.L.R. 1-132 (2002), Claimant served *Requests for Admission* on Employer and Director to which Employer responded and admitted certain matters, but remained silent on other matters, including the existence of pneumoconiosis and disability causation. The Director failed to respond. At the hearing, Employer's counsel withdrew controversion of all issues listed on the CM-1025 except the existence of pneumoconiosis and disability causation. At that time, Claimant's counsel "did not contend that employer had already admitted the existence of pneumoconiosis and that claimant's total disability is due to pneumoconiosis due to its failure to respond to claimant's request for an admission on these matters." The hearing proceeded on the merits.

For the first time in its closing brief, Claimant argued that, pursuant to 29 C.F.R. § 18.20, Employer admitted the existence of pneumoconiosis as well as the etiology of Claimant's disability in failing to respond to requests for admissions on these issues. The Board upheld the ALJ's denial of benefits and concluded that the "statement of issues (on the CM-1025) prepared by the district director is of critical importance, as the regulations contemplate that this document will provide the road map for the hearing." The Board further stated the following:

> The alleged admissions that claimant points to under 29 C.F.R. § 18.20 are in conflict with the issues listed on the Form CM-1025 pursuant to the black lung regulations, yet claimant does not explain his apparent assumption that the black lung procedures are trumped by 29 C.F.R. § 18.20 because of employer's technical error in drafting its response to the request for admissions.

Citing to 20 C.F.R. § 725.455(a), the Board noted that the ALJ was not bound by technical or formal rules of procedure except as provided by the Administrative Procedure Act and 20 C.F.R. Part 725. Moreover, Claimant did not appear to rely on Employer's alleged admissions in preparing for trial. The Board concluded that the provisions at 29 C.F.R. § 18.20 were "inapplicable in the procedural context of this case because the black lung regulations are 'controlling.'" The Board further noted that, even if 29 C.F.R. § 18.20 was applicable, Claimant waived his right to rely on Employer's alleged admissions because he failed to raise this issue at the hearing.3

V. Establishing total disability

B. After applicability of 20 C.F.R. Part 718 (2001)

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the court upheld the validity of the amended regulations at 20 C.F.R. § 718.204(a) (2001). These provisions state, in part, that "any nonpulmonary or nonrespiratory condition or disease, which causes independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." The court further clarified that its holding in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), wherein the court concluded that a miner suffering from a pre-existing non-respiratory impairment was not entitled to black lung benefits, applied only to claims adjudicated under 20 C.F.R. Part 727, and not to claims adjudicated under 20 C.F.R. Part 718.

4. Reasoned medical opinions

a. Burden of proof

Citation correction ("comparable and gainful work"): 20 C.F.R. § 718.204(b)(2) (2000) or 20 C.F.R. § 718.204(b)(1)(ii) (2001).

VI. Etiology of total disability

The paragraph should be corrected to read as follows: Unless one of the presumptions at 20 C.F.R. §§ 718.304, 718.305, or 718.306 (2000) and (2001) is applicable, a miner must establish that his or her total disability is due, at least in part, to pneumoconiosis. The Board has held that "[i]t is [the] claimant's burden pursuant to § 718.204 to establish total disability due to pneumoconiosis . . . by a preponderance of the evidence." *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986) (en banc).

A. "Contributing cause" standard

1. Prior to applicability of 20 C.F.R. Part 718 (2001)

º ***Sixth Circuit.*** In *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467 (6th Cir. 2003), the court set forth the standard for establishing that a miner's total disability is due to pneumoconiosis and stated the following:

> The claimant bears the burden of proving total disability due to pneumoconiosis and . . . this causal link must be more then *de minimus*. (citation omitted). To satisfy the 'due to' requirement of the BLBA and its implementing regulations, a claimant must demonstrate by a preponderance of the evidence that pneumoconiosis is 'more than merely a speculative cause of his disability,' but instead 'is a contributing cause of some discernible consequence to his totally disabling respiratory impairment.'

(citation omitted). To the extent that the claimant relies on a physician's opinion to make this showing, such statements cannot be vague or conclusory, but instead must reflect reasoned medical judgment. (citation omitted).

2. After applicability of 20 C.F.R. Part 718 (2001)

Percentage of contribution to total disability not required. In *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004), (unpub.), the court disagreed with Employer's argument that there was insufficient evidence to conclude that the miner's respiratory disability was due to pneumoconiosis because the physicians "could not apportion the relative effects of tobacco use and coal mine dust exposure . . .." Citing to *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th cir. 2000) with approval, the court held that physicians are not required to precisely determine the percentages of contribution to total disability; rather, "[t]he ALJ needs only to be persuaded, on the basis of all available evidence, that pneumoconiosis is a contributing cause of the miner's disability."

Cross-reference: For possible application of collateral estoppel in a survivor's claim, *see Chapter 25:* Principles of Finality.

II. Qualifying for benefits

A. Surviving spouse and surviving divorced spouse

2. Spouse – dependency upon the miner

In *Lombardy v. Director, OWCP*, 355 F.3d 211 (3rd Cir. 2004), the ALJ properly found that a surviving divorced spouse's reliance on social security benefits, deriving from the miner's employment, did not qualify her as a "dependent" of the miner for purposes of receiving black lung benefits. The court cited to *Taylor v. Director, OWCP*, 15 B.L.R. 1-4, 1-7 (1991) as well as *Director, OWCP v. Ball*, 826 F.2d 603 (7th Cir. 1987), *Director, OWCP v. Hill*, 831 F.2d 635 (6th Cir. 1987), and *Director, OWCP v. Logan*, 868 F.2d 285, 286 (8th Cir. 1989) to hold that SSA benefits are not part of the miner's property and do not constitute a "contribution" to the survivor for purposes of establishing dependency under the Black Lung Benefits Act.

II. Standards of entitlement

B. Survivor's claim filed prior to January 1, 1982 and there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982

2. Lay evidence

In *Soubik v. Director, OWCP*, 366 F.3d 226 (3rd Cir. 2004)3, the court stated that its decision in *Hillibush v. Dep't. of Labor*, 853 F.2d 197, 205 (3rd Cir. 1988) provides that the survivor may prove her claim using "medical evidence alone, non-medical evidence alone, or the combination of medical and non-medical evidence . . .." Thus, *Hillibush* required that the ALJ consider lay evidence in determining whether the miner had a pulmonary or respiratory impairment, but "[e]xpert testimony will usually be required to establish the necessary relationship between . . . observed indicia of pneumoconiosis and any underlying pathology." As a result, the court determined that it was error for the ALJ to accord less weight to a medical opinion because it was based, in part, on lay evidence.

3 While the case was pending on appeal, the court noted that the widow died and the executor of her estate, John Soubik, was substituted as the appellant.

Chapter 24
Multiple Claims Under § 725.309

I. Generally

A. Re-filing more than one year after prior denial

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the court upheld application of the amended definition of "pneumoconiosis," *i.e.* that it is a latent and progressive disease. The court noted that the issue of "[w]hether pneumoconiosis . . . is a disease that can be latent and progressive is a scientific question," but the "Department of Labor's regulation reflects the agency's conclusion on that point" and the agency's regulation is entitled to deference. The court found that the regulation is designed to "prevent operators from claiming that pneumoconiosis is *never* latent and progressive." As a result, the court declined to require that Claimant present medical evidence that the miner's pneumoconiosis was "one of the particular kinds of pneumoconiosis that are likely to manifest latent and progressive forms."

IV. Proper review of the record

A. Prior to applicability of 20 C.F.R. Part 725.309 (2001)- "material change in conditions"

In *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467 (6th Cir. 2003), a multiple claim arising under the pre-amendment regulations at 20 C.F.R. § 725.309 (2000), the court reiterated that its decision in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) requires that the ALJ resolve two specific issues prior to finding a "material change" in a miner's condition: (1) whether the miner has presented evidence generated since the prior denial establishing an element of entitlement previously adjudicated against him; and (2) whether the newly submitted evidence differs "qualitatively" from evidence previously submitted. Specifically, the *Flynn* court held that "miners whose claims are governed by this Circuit's precedents must do more than satisfy the strict terms of the one-element test, but must also demonstrate that this change rests upon a qualitatively different evidentiary record." Once a "material change" is found, then the ALJ must review the entire record *de novo* to determine ultimate entitlement to benefits.

In *Flynn*, the ALJ properly held that the miner demonstrated a "material change in conditions" based on a comparison of the restrictions listed in Dr. Martin Fitzhand's 1980 and 1984 medical reports. In the 1980 report, which was submitted with the first claim, Dr. Fitzhand determined that the miner could perform "mild activity at best"; whereas by 1984, in the second claim, Dr. Fitzhand opined that the miner could do "no more than sedentary activity." The ALJ reasonably noted that the miner's last coal mining job, although light-duty work, required more than sedentary activity. The

court stated that this "downgraded assessment" was further supported by underlying objective testing, including physical examinations, pulmonary function studies, and blood gas studies. As a result, it upheld the ALJ's finding of "material change in conditions."

In *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004), the circuit court found that Claimant established that he was totally disabled in the fourth claim, which was sufficient to find a "material change in conditions" since denial of his third claim.

By unpublished decision in *McNally Pittsburgh Manufacturing Co. v. Director, OWCP*, Case No. 03-9508 (10th Cir. Feb. 10, 2004), the court clarified its "material change" standard in *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1511 (10th cir. 1996) to state that "in order for an administrative law judge to determine whether a claimant establishes this necessary change in his or her physical conditions, the administrative law judge should determine whether evidence obtained after the prior denial demonstrates a material worsening of those elements found against the claimant." In the case before it, the miner filed a petition for modification of the district director's denial of his original claim. The claim was denied on modification and, after more than one year, the miner filed a second claim. The court determined that, when assessing whether a "material change in conditions" is established, the administrative law judge must use the date of denial of the original claim, not the date of denial on modification.

B. After applicability of 20 C.F.R. Part 725.309 (2001)

1. Establishing an element of entitlement previously denied

In *White v. New White Coal Co.*, 22 B.L.R. 1-__, BRB No. 03-0367 BLA (Jan. 22, 2004), the Board upheld the ALJ's denial of the miner's multiple claim on grounds that the miner failed to establish that he was totally disabled or that he suffered from pneumoconiosis. With regard to the elements of causation, the Board stated the following:

> Although the administrative law judge did not render findings on the two other 'requirements for entitlement,' . . . claimant has not raised any further allegations of error. We, therefore, affirm the administrative law judge's finding that this claim fails pursuant to Section 725.309 because claimant has not established that one of the applicable elements of entitlement has changed since the date of the denial of the prior claim . . ..

Slip op. at 7.

VI. Effect of the three-year statute of limitations

? ***Benefits Review Board.*** In *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-__, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (en banc), the Board declined to apply the three year statute of limitations to a subsequent claim filed under 20 C.F.R. § 725.309 (2001) in a case arising in

the Fourth Circuit. Citing to its decision in *Faulk v. Peabody Coal Co.*, 14 B.L.R. 1-18 (1990), the Board concluded that applying the statute of limitations only to an initial claim "satisfies the purpose of the statute of limitations by ensuring that employer is provided with notice of the current claim and of the potential for liability for future claims, in view of the progressive nature of pneumoconiosis."

Chapter 25
Principles of Finality

I. Appellate decisions

C. Law of the case

By unpublished decision in *Mitchell v. Daniels Co.*, BRB Nos. 01-0364 BLA and 03-0134 BLA (Feb. 12, 2004), the Board held that the "law of the case" doctrine does not apply to a modification proceeding; rather, all judicially determined facts, including length of coal mine employment and designation of the proper responsible operator, must be reviewed *de novo* on modification. This is so even where the findings were previously affirmed by the Board on appeal.

III. Res judicata and collateral estoppel

B. Collateral estoppel

2. Examples of application

f. Miner's and survivor's claims—existence of pneumoconiosis

· *Prior award in miner's claim and no autopsy evidence.*

- Citation update: *Benefits Review Board. Collins v. Pond Creek Mining Co.*, 22 B.L.R. 1-229 (2003).
- Citation update: *Third and Fourth Circuits; special considerations. Sturgill v. Old Ben Coal Co.*, 22 B.L.R. 1-315 (2003).
- Citation update: On appeal, in *Howard v. Valley Camp Coal Co.*, Case No. 03-1706 (4th Cir. Apr. 14, 2004) (unpub.), the Fourth Circuit affirmed the decision of the Board and held that, , because of an intervening change in the law, Employer was not collaterally estopped from re-litigating the existence of pneumoconiosis in a survivor's claim where benefits were awarded in the miner's earlier claim. Specifically, the court noted that at the time benefits were awarded in the miner's claim pneumoconiosis could be established under any one of the four methods set forth at 20 C.F.R. § 718.202(a)(1)-(4). Subsequently, however, the court issued *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2003), which required that the fact-finder weigh evidence under all four methods together to determine the presence of pneumoconiosis. As a result, the court held that "the requirement of identicality of issues was not satisfied" in the survivor's claim due to this intervening change in the law.

III. Amount of the fee award

A. Generally

2. Enhancement of the fee for delay—proper for employer but not Director, OWCP

Citation update: *Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003).

D. The hourly rate and hours requested

In *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the court upheld the ALJ's award of $225.00 per hour to Claimant's counsel for successful prosecution of his black lung claim. Employer argued that counsel normally charged $175.00 for most civil litigation matters. The court concluded that the ALJ properly considered the factors set forth at 20 C.F.R. § 725.366(b) in approving of counsel's requested hourly rate.

VALIDATION OF REGULATIONS

The Department=s amended black lung regulations challenged by the National Mining Association were upheld by the D.C. Circuit Court of Appeals in *National Mining Ass=n., et al. v. Dep=t. of Labor*, 292 F.3d 849 (D.C. Cir. 2002) with the exception of a few provisions found to be impermissibly retroactive and a cost-shifting provision found to be invalid.

1. RETROACTIVITY

[a] AFFIRMED

Upon review of the challenged regulations, the court held that the following provisions were not impermissibly retroactive:

- the Atreating physician rule@ at 20 C.F.R. ' 718.104(d) Ais not retroactive because it codifies judicial precedent and does not work a substantive change in the law@;
- the amended definition of pneumoconiosis at 20 C.F.R. ' 718.201(a)(2), which provides that legal pneumoconiosis may include Aany chronic restrictive or obstructive pulmonary disease arising out of coal mine employment,@ is not impermissibly retroactive because it does not create any presumption that an obstructive impairment is coal dust related; rather, it is the claimant=s burden to establish that his/her restrictive or obstructive lung disease arose out of coal mine employment;
- the amended provisions at 20 C.F.R. ' 718.201(c), which provide that pneumoconiosis is Arecognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure,@ are not impermissibly retroactive. The court noted that both parties agreed that, in rare cases, pneumoconiosis is latent and progressive. As a result, the court found that the amended regulation Asimply prevents operators from claiming that pneumoconiosis is never latent and progressive@;
- the provisions at 20 C.F.R. ' 725.309(d), related to filing multiple claims, are not improperly retroactive; and
- the provisions at 20 C.F.R. ' 725.101(a)(6), wherein the definition of Abenefits@ includes expenses related to the Department-sponsored medical examination and testing of the miner under ' 725.406, is not impermissibly retroactive. Under the amended provisions, as with the prior version of the regulations, the Trust Fund is reimbursed by the employer for the costs of the Department-sponsored examination in the event that the claimant is successful.

[b] NOT AFFIRMED

The court did, however, remand the case for further proceedings regarding certain provisions, which were impermissibly retroactive. The court defined an impermissibly retroactive regulation as a regulation applying to pending claims where Athe new rule reflects a substantive change from the position taken by any of the Courts of Appeals and is likely to increase liability . . ..@ With this criteria

in mind, the court concluded that the following regulations were improperly retroactive:

- the Atotal disability rule@ at 20 C.F.R. ' 718.204(a) is impermissibly retroactive because the amendments provide that Aan independent disability unrelated to the miner=s pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis@ contrary to the Seventh Circuit=s holding in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994) (holding that a non-respiratory or non-pulmonary disability, such as a stroke, will preclude entitlement to black lung benefits);
- the provisions at 20 C.F.R. ' 725.101(a)(31), which provide that A[a] payment funded wholly out of general revenues shall not be considered a payment under a workers= compensation law,@ are impermissibly retroactive. The court cited to a contrary decision from the Third Circuit in *Director, OWCP v. Eastern Associated Coal Corp.*, 54 F.3d 141 (3rd Cir. 1995), wherein the court declined to adopt the Director=s policy of not reducing a miner=s black lung benefits by any amount s/he received from general revenues under a state occupational disease compensation act;
- the medical treatment dispute provisions at 20 C.F.R. ' 725.701 are impermissibly retroactive as they create a rebuttable presumption that medical treatment for a pulmonary disorder is related to coal dust exposure contrary to the Sixth Circuit=s holding in *Glen Coal Co. v. Seals*, 147 F.3d 502 (6th Cir. 1998); and
- the amended provisions at 20 C.F.R. '' 725.204, 725.212(b), 725.213(c), 725.214(d), and 725.219(c) and (d) are impermissibly retroactive Abecause they expand the scope of coverage by making more dependents and survivors eligible for benefits.@

2. ARBITRARY AND CAPRICIOUS, NOT FOUND

In addition to reviewing the regulatory amendments to determine whether they could be retroactively applied, the court also analyzed substantive changes in the following regulations and determined that they were not Aarbitrary and capricious@:

- the definition of pneumoconiosis at 20 C.F.R. ' 718.201(a), to include Alegal@ and Amedical@ pneumoconiosis, is proper as it Amerely adopts a distinction embraced by all six circuits to have considered the issue@;
- the provisions at 20 C.F.R. ' 718.201(c), which state that pneumoconiosis is recognized as a Alatent and progressive disease which may first become detectable only after cessation of coal mine dust exposure,@ is not arbitrary and capricious given the government=s narrow construction of the regulation during oral argument that pneumoconiosis Amay@ be latent and progressive as well as a study cited at 62 Fed. Reg. 3,338, 3,344 (Jan. 22, 1997), which supports a finding that pneumoconiosis is latent and progressive Aas much as 24% of the time@;
- the Achange in condition@ rule at 20 C.F.R. ' 725.309 is not arbitrary and capricious because the burden of proof continues to rest with the claimant to demonstrate that one of the applicable conditions of entitlement has changed;
- the Atreating physician rule@ at 20 C.F.R. ' 718.104(d) provides that a treating physician=s

opinion Amay@ be accorded controlling weight, but the rule is not Amandatory.@ As a result, the court concluded that it did not arbitrary and capricious nor does it improperly shift the burden of proof from the claimant to the employer;

- the >hastening death@ rule at 20 C.F.R. ' 718.205(c)(5) is not arbitrary and capricious because the regulation Anowhere mandates the conclusion that pneumoconiosis be regarded as a hastening cause of death, but only describes circumstances under which a hastening-cause conclusion may be made@;
- the responsible operator designation provisions at 20 C.F.R. ' 725.495(c) are not arbitrary and capricious A[w]here, as here, the Secretary affords a mine operator liable for a claimant=s black lung disease the opportunity to shift liability to another party, it is hardly irrational to require the operator to bear the burden of proving that the other party is in fact liable@;
- the medical treatment dispute regulation at 20 C.F.R. ' 725.701(e) is not arbitrary and capricious; and
- the total disability rule at 20 C.F.R. ' 718.204 is not arbitrary and capricious merely because it abrogates the Seventh Circuit=s decision in *Peabody Coal Co. v. Vigna*.

3. BURDEN OF PROOF NOT IMPROPERLY SHIFTED

The court also upheld the following regulations on grounds that they did not improperly shift the burden of proof:

- the regulation at 20 C.F.R. ' 725.408, which sets a deadline for an operator to submit evidence if it disagrees with its designation as the potentially liable operator, does not improperly shift the burden of proof from the Director to the employer to identify the proper responsible operator; rather, the court found that the regulation Ashifts the burden of production, not the burden of proof; it requires nothing more than that operators must submit evidence rebutting an assertion of liability within a given period of time@; and
- the medical treatment dispute regulation at 20 C.F.R. ' 725.701(e) does not improperly shift the burden of proof to the employer to Adisprove medical coverage@; rather, Athe Secretary explains that it shifts only the burden of production to operators to produce evidence that the treated disease was unrelated to the miner=s pneumoconiosis; the ultimate burden of proof remains on claimants at all times.@

4. LIMITATION OF EVIDENCE UPHELD

The court also upheld the evidence limitation rules on grounds that the Administrative Procedure Act at 5 U.S.C. ' 556(d), as well as the Black Lung Benefits Act, permit the agency to exclude Airrelevant, immaterial, or unduly repetitious evidence@ as Aa matter of policy.@ Moreover, the circuit court noted that the amended regulations afford ALJs the discretion to admit additional evidence for Agood cause.@ *See* 20 C.F.R. ' 725.456(b)(1). The court also determined that the evidentiary limitations were not arbitrary and capricious.

5. COST SHIFTING NOT UPHELD WHERE CLAIMANT UNSUCCESSFUL

Finally, the court found that the cost-shifting regulation at 20 C.F.R. ' 725.459 was Ainvalid on its face@ because it improperly permitted ALJs, in their discretion, to shift costs incurred by a claimant=s production of witnesses to an employer, regardless of whether the claimant prevailed. The court noted that the Secretary is authorized to shift attorney=s fees under 33 U.S.C. ' 928(d) only in the event that the claimant prevails.

Regulatory provision	Case citation	Holding (valid/invalid)
725.101(a)(31)	*National Mining Ass=n., et al. v. Dep=t. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid, but cannot be retroactively applied (NOTE: The Department revised its amended regulations to comport with the court's holding. *See* the amended language at § 725.2, 68 Fed. Reg. 69,930, 69,935 (Dec. 15, 2003)).
718.104(d)	*National Mining Ass=n., et al. v. Dep=t. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid
718.201(a)	*National Mining Ass=n., et al. v. Dep=t. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid
718.201(c)	*National Mining Ass=n., et al. v. Dep=t. of Labor*, 292 F.3d 849 (D.C. Cir. 2002). *See also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473 (7th Cir. 2001); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004)	Valid (court noted that this provision Asimply prevents operators from claiming that pneumoconiosis is never latent and progressive@)
718.204(a)	*National Mining Ass=n., et al. v. Dep=t. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid, but cannot be retroactively applied (NOTE: The Department

		revised its amended regulations to comport with the court's holding. *See* the amended language at § 718.2, 68 Fed. Reg. 69,930, 69,935 (Dec. 15, 2003)).
	Midland Coal Co. v. Director, OWCP [Shores], 358 F.3d 486 (7th Cir. 2004)	Regulatory amendment at § 718.204(a) (2001) providing that total disability due to non-coal dust related impairment not preclude coal dust related impairment is valid and was applied in a pre-amendment case
725.205(c)(5)	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332 (7th Cir. 2002)	Valid
725.212(b), 725.213(c), 725.214(d), and 725.219(d) dependents and survivors	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid, but cannot be retroactively applied (NOTE: The Department revised its amended regulations to comport with the court's holding. *See* the amended language at § 725.2, 68 Fed. Reg. 69,930, 69,935 (Dec. 15, 2003)).
725.309	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid
725.408	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid

725.414	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-__ (June 28, 2004) (en banc)	Valid
725.456(b)(1)	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid
725.459	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Invalid on its face (related to requiring Employer to pay for questioning Claimant's experts even where Claimant does not prevail) (NOTE: The Department revised its amended regulations to comport with the court's holding. *See* the amended language at § 725.456, 68 Fed. Reg. 69,930, 69,935 (Dec. 15, 2003)).
725.495	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	Valid
725.504	*Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002)	Valid
725.608	*Frisco v. Consolidation Coal Co.*, 22 B.L.R. 1-321 (2003)	Valid
725.701(e)	*National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002) *Glen Coal Co. v. Director, OWCP [Seals]*, Case Nos. 01-4014 and	Valid, but cannot be retroactively applied Validity of subsections (e)

	02-3195 (6th Cir., Aug. 5, 2003) (unpub.)	and (f) affirmed in *dicta* (NOTE: The Department revised its amended regulations to comport with the court's holding. *See* the amended language at § 725.2, 68 Fed. Reg. 69,930, 69,935 (Dec. 15, 2003)).